

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Domestic Security Committee

BILL: SPB 7016

SPONSOR: For consideration by Domestic Security Committee

SUBJECT: Open Government Sunset Review/Medical Facilities Information

DATE: November 1, 2005

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Pardue</u> | <u>Skelton</u> | _____ | Pre-meeting |
| 2. | _____ | _____ | _____ | _____ |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This proposed committee bill reenacts the public records exemption provided for information concerning medical facilities and laboratories which is maintained by the Department of Health as part of state's plan to defend against terrorism. The bill provides for the exemption of any information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health. The bill deletes the provisions that repeal the exemption.

This bill reenacts and amends s. 381.95, F.S.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, ch. 119, F.S., specifies the conditions under which public access must be provided to governmental records. While the State Constitution provides that records are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, of the Florida Constitution, governs the creation and expansion of exemptions to

provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, of the Florida Constitution, provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

The Open Government Sunset Review Act (s. 119.15, F.S.), provides for the repeal and prior review of any public records or meetings exemptions that are created or substantially amended in 1996 and subsequently. The chapter defines the term “substantial amendment” for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption. The law was amended by ch. 2005-251, Laws of Florida, to modify the criteria under the Open Government Sunset Review Act so that consideration will be given to reducing the number of exemptions by creating a uniform exemption during the review of an exemption subject to sunset.

Under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

2001 Legislative Findings

In creating s. 381.95, F.S., the Legislature found the public necessity to exempt medical facility information because information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained or regulated by the Department of Health as part of the state's plan to defend its residents against future acts of terrorism is information that could be used by terrorists in planning acts of terrorism.¹ The finding further stated that if terrorists were able to discover this information used to defend the state and its residents and visitors against an act of terrorism, they could use it to craft a terrorist act to which the state may not be as well prepared to respond. This information could be used to increase the number of people injured or killed in a terrorist act. Although some skill would be required to use such information to further an act of terrorism, ample evidence of the capabilities of terrorists to conduct complicated acts of terrorism exist.

2005 Open Government Sunset Reviews

The Senate Domestic Security Committee, in its review of Senate Interim Project Report 2006-212, accepted the recommendation that the exemption provided for medical facilities information continues to be sufficiently compelling to override the strong public policy of open government.

International terrorists continue to demonstrate the ability to plan and carry out sophisticated acts of terrorism. Their capability appears to be no less today than at the time of the Legislature's original findings in 2001.

III. Effect of Proposed Changes:

This bill reenacts the public records exemption provided for information concerning medical facilities and laboratories which are maintained by the Department of Health as part of state's plan to defend against terrorism. The bill provides for the exemption of any information identifying or describing the name, location, pharmaceutical cache, contents, capacity,

¹ Chapter 2001-363, L.O.F.

equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health.

The bill also provides that the Governor's certification of the sufficiency of medical facility information covered by the exemption is a public record. Further, the bill allows custodial agency disclosure of exempt information to another state or federal agency in order to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism or to prosecute those responsible for such attempts of acts. Such information retains its exempt status while in the custody of the receiving agency.

This SPB reenacts s. 381.95 and amends the section by deleting the provision that repeals the exemption.

This SPB provides for an effective date of October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.² This requirement was met by Chapter 2001-363, L.O.F.

Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.³ This SPB is in compliance with the provision.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

² See, *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999)

³ Art. I, s.24(c) of the State Constitution

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
